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No. 93-1167

In The

Supreme Court of the United States

October Term, 1993

BONNIE L. HICKLE,

Petitioner,

v.

AMERICAN SERVICE CORPORATION OF SOUTH CAROLINA,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Respondent agrees with Petitioner that the validity of South Carolina's discrimination under the privileges and immunities clause depends on two questions, but disagrees as to the answers to those two questions.

1.a. Respondent first describes the subject matter of the discrimination in this case as "exemptions," and argues that this subject "is not so basic as to fall within the purviews of the Privileges and Immunities Clause." Op. Cert., p. 2. The sole support for this argument, however, is one paragraph and four cases of this Court which in fact hold to the contrary.

The subject of "exemptions" is actually part of the overall subject of access to courts, which is indisputably a fundamental privilege and immunity. This is confirmed by all four cases cited by Respondent, each of which dealt with different aspects of the issue of access to courts (such as attachments, bonds, and statutes of limitation). In each case, this Court followed the same two-part analysis used in recent cases (albeit not so explicitly), and in each case the Court treated the issue as one involving access to courts, characterized the issue as fundamental, and then went to the second question, i.e., whether there was a sufficient state justification for different treatment of citizens and non-citizens.

b. In several of the cases, this Court found a sound reason for different treatment, and upheld the statute. However, in the case most nearly like ours, the statute was struck down. In that case, *Blake v. McClung*, 172 U.S. 239 (1898), a Tennessee statute dealt with distribution of corporate assets to satisfy debts, and gave citizen creditors priority ahead of non-citizen creditors. In other words, the statute provided that in some cases, a citizen stood a better chance of collecting a judgment than a non-citizen. This Court struck the statute down, saying that such "discrimination against citizens of other states" was "repugnant" to the privileges and immunities clause. 172 U.S. at 254.

Here, likewise, South Carolina says that a citizen may collect a judgment in situations where a non-citizen may not. Under *Blake v. McClung*, this is assuredly an aspect of the fundamental privilege of access to the courts.

Moreover, the later history of *Blake v. McClung* is even clearer. On remand in that case, the Tennessee court still gave citizen creditors a slight advantage over non-citizens. This Court reversed again, holding that its prior decree required the state court to "see to it that no advantage accrued to Tennessee creditors over Ohio creditors." *Blake v. McClung*, 176 U.S. 59 (1900). This Court underlined repeatedly that out-of-state and in-state creditors were to share "upon terms of equality, in all respects," and that "no decree giving to the latter privileges or advantages that are denied to the former is . . . consistent with the Constitution of the United States." 176 U.S. at 68.

2. If the discrimination touches a fundamental matter, as here, the inquiry turns to whether there is a substantial state interest involved and whether the type and extent of the discrimination is closely tied to the advancement of that state interest. This Court has repeatedly said that different treatment will not be upheld "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978).

Here Respondent does no more than repeat the South Carolina Supreme Court's assertion of a state interest in keeping its citizens from becoming dependent upon the state for support. Op. Cert., p. 3.[1] With all due respect, Petitioner is unaware of any case, ever, which has judged this all-encompassing "interest" to justify discrimination

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[1] Respondent also says non-residents must be prevented from "double-dipping" into the benefits of two States, but this is a red herring because the ruling below prevents Petitioner from receiving the benefits of *either* State's exemptions.

against non-citizens. If it did, every difference could be justified, even different tax rates, and even the preference for resident creditors which was rejected in *Blake v. McClung*.

True, some cases have supported different treatment based on states' interests in preserving scarce resources, such as elk (*Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978)), but that can hardly be equated with Respondent's all-encompassing argument.

The interest thus asserted is exactly what the privileges and immunities clauses bars. South Carolina may profess indifference to whether citizens of other states become dependent upon those states for support, but the privileges and immunities clause does not recognize that "interest" as a basis for having different laws for citizen and foreigner. It is no different from the general financial preference for citizens struck down as long ago as *Blake v. McClung* and as recently as *Hicklin v. Orbeck*.

Respectfully submitted,

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